NO. 42382-6-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

OTHNIEL BLANCAFLOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

Other Authorities

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR.

1. Mr. Blancaflor was denied his right to a unanimous and impartial jury by the court's substitution of an alternate juror without instructing the jury to disregard all prior discussions and deliberations.

2. The court violated the constitutional prohibition against double jeopardy by imposing multiple convictions for employer false reporting under RCW 51.48.020 when the conduct was not based on separate units of prosecution.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR.

1. A person accused of a crime has the constitutionally protected right to verdict from an impartial and unanimous jury. In order to protect that right, when a juror is replaced during deliberations, the trial court must instruct the jury to begin deliberations anew. In Mr. Blancaflor's case, the trial court did not provide any additional instructions to the jury when replacing a seated juror with an alternate after the jury had commenced deliberations. Does the court's failure to ensure that the jury based its verdict upon unanimous and joint deliberation entitle Mr. Blancaflor to reversal of his convictions?

2. Multiple charges based on violations of the same statute violate double jeopardy if the charges are based on a single unit of prosecution. The unit of prosecution for an employer's false reporting of employees or payroll to the state is not defined based on the year in which the misrepresentations occurred and the statute contemplates on-going employer misconduct. The prosecution charged Mr. Blancaflor with three counts of employer false reporting with each count based on the year of the misrepresentations. Does the State's division of the charge of employer false reporting into multiple counts based on a unit of prosecution that is not supported by the statute violate double jeopardy?

C. SUPPLEMENTAL STATEMENT OF THE CASE.

Othniel and Cynthia Blancaflor were both charged with three counts of employer false reporting of payroll or employee hours and one count of first degree theft. CP 61-64; CP 177-97. The trial testimony lasted five days and included the testimony of both defendants. 2RP 75-6RP 912.

After the court read the jury instructions aloud to the jurors and the parties presented closing arguments, the court excused the alternate jurors and instructed the remaining jurors to "commence your

deliberations." 6RP 985. Shortly thereafter, the clerk's minutes indicate that the jury "knocks with a question." Supp. CP _, sub. no. 51 (clerk's minutes, page 18). After assembling the attorneys but having been unable to contact the two defendants, the court told the lawyers that it received information that Juror 3 had travel plans the next day. *Id.* The court called Juror 3 into the courtroom at 4:07 p.m.; 37 minutes after the jury had started deliberations, and asked about her availability. *Id.*; 6RP 989. Juror 3 explained she had an airplane ticket to California the next day scheduled to leave at 5:55 p.m. 6RP 990. The court instructed the juror to return to the jury room. 6RP 992.

The court postponed any decision on whether Juror 3 should continue deliberating or be replaced by an alternate juror until the next day, so that the defendants could be present to discuss the matter. 6RP 992-93. The next morning, the defendants were present and the parties agreed that Juror 3 should be replaced by an alternate. 7RP 1000. The court called all jurors into the courtroom, excused Juror 3, and told the remaining jurors to be patient while an alternate was located. 7RP 1001-02.

An alternate joined the deliberating jurors at 10:37 a.m., and the jury announced its verdict at 2:15 p.m., after a lunch recess. Supp. CP _

, sub. no. 51 (clerk's minutes, pages 19-20). At no time during these events did the court tell the jurors that they must disregard all prior discussions about the case and begin deliberations anew once joined by the replacement juror.

The pertinent facts are further discussed in Appellant's Opening Brief as well as the relevant argument sections below.

D. ARGUMENT.

1. **By replacing a juror with an alternate during deliberations without instructing the jury to begin deliberations anew, the court violated Mr. Blancaflor's right to an impartial and unanimous jury**

After the court instructed the jury to commence deliberations, a deliberating juror revealed that she had a plane ticket to California and could not remain. The next day, a previously dismissed alternate juror returned to court, participated in deliberations, and voted to convict Mr. Blancaflor of the four charged offenses. Prior to reconstituting the deliberating jurors, the court did not instruct the jurors that they must begin deliberations anew and disregard all prior deliberations. The court did not speak with the alternate juror to verify that she remained impartial and unbiased. The court's failure to reinstruct the jury or

assess the partiality of the alternate juror deprives Mr. Blancaflor of his right to an impartial and unanimous trial by jury.

a. *Mr. Blancaflor has a constitutionally protected right to a unanimous and impartial jury.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 22 of the Washington Constitution guarantee a defendant the right to an impartial jury. *Wainwright v. Witt,* 469 U.S. 412, 429-30, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); *State v. Davis,* 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Article I, section 21 of the Washington Constitution requires a unanimous verdict in criminal cases and is more protective of the right to jury trial than the federal constitution. *State v. Ortega-Martinez,* 124 Wn.2d 702, 707, 881 P.2d 231 (1994); *see State v. Williams-Walker*, 167 Wn.2d 889, 896, 889-900, 225 P.3d 913 (2010).

To ensure that the right to a unanimous and impartial jury is adequately protected, when a juror is discharged during deliberations and replaced with an alternate, the court must instruct the reconstituted jury to disregard all previous deliberations and begin deliberations

anew. CrR 6.5; *State v. Johnson,* 90 Wn.App. 54, 72-73, 950 P.2d 981 (1998). CrR 6.5 governs the use of alternate jurors and provides that:

> [an] alternate juror may be recalled at any time that a regular juror is unable to serve.... If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

The purpose of the rule is to "assure jury unanimity--to assure the parties, the public and any reviewing court that the verdict rendered has been based upon the consensus of the 12 jurors who rendered the final verdict, based upon the common experience of all of them." *State v. Ashcraft,* 71 Wn.App. 444, 466, 859 P.2d 60 (1993). "These are matters which relate directly to a defendant's constitutional right to a fair trial before an impartial jury and to a unanimous verdict." *Id.* at 463. This Court reviews a claim of constitutional error *de novo*. *State v. Stanley,* 120 Wn.App. 312, 314, 85 P.3d 395 (2004). The failure to reinstruct the jury after replacing a juror is a manifest constitutional error which may be raised for the first time on appeal. *Stanley,* 120 Wn.App. at 314; *Ashcraft,* 71 Wn.App. at 465-67; RAP 2.5(a)(3).

b. *The trial court's failure to instruct the jury to begin deliberations anew violated Mr. Blancaflor's right to a unanimous and impartial jury.*

A trial court commits reversible error when the record fails to establish it reinstructed the jury following the replacement of a juror with an alternate juror. *Ashcraft,* 71 Wn.App. at 467. The record must provide the reviewing court with "assurance" that "the mandatory instruction was given." *Id.* at 466.

In *Ashcraft,* the trial court replaced a deliberating juror with an alternate juror due to the juror's unavailability without discussing the matter and without any record it reinstructed the jury. *Id.* This Court held that "it was reversible error of constitutional magnitude to fail to instruct the reconstituted jury *on the record* that it must disregard all prior deliberations and begin deliberations anew." *Id.* at 464 (emphasis in original). This Court made clear that a reviewing court must be able to tell "*from the record*" that the reconstituted jury was properly instructed. *Id.* at 464, 466 (emphasis in original).

In reaching its conclusion in *Ashcraft,* this Court noted, "It is not beyond the realm of reasonable possibility that . . . the alternate and the remaining initial 11 jurors could have concluded, in all good faith but erroneously, that they need not deliberate anew as to any counts or

issues upon which the initial 12 jurors may have reached agreement." *Ashcraft,* 71 Wn.App. at 466-67. Because this Court could not determine from the record whether the jury had been instructed to begin deliberations anew, the court reversed and remanded for a new trial reasoning, "An appellate court must be able to determine *from the record* that jury unanimity has been preserved." *Id.* at 465 (emphasis added).

Subsequently, in *Stanley,* the trial court replaced a deliberating juror with an alternate juror without instructing the reconstituted jury on the record to begin deliberations anew. 120 Wn.App. at 313. In addition, the record failed to show whether Stanley or his counsel was present when the alternate juror was seated or whether the court conducted a hearing to assess the alternate juror's continued impartiality. *Id.* While the State conceded the trial court committed error, it argued that the error was harmless. *Id.* at 316. Relying on *Ashcraft,* this Court held that the State bore the burden of proving beyond a reasonable doubt the harmlessness of the error, and the reviewing court must be able to determine *from the record* that jury unanimity was preserved. *Id.*

A pattern jury instruction, WPIC 4.69.02, contains an instruction for the jury "whenever it is necessary to seat an alternate juror during the course of deliberations." 11 Wash. Prac., Pattern Jury Instr. Crim. 4.69.02, Note on Use (3d Ed 2008). The instruction informs that jury that it "must disregard all previous deliberations and begin deliberations anew." WPIC 4.69.02.

Here, the court did not instruct the jury that it was required to begin deliberations anew as provided in WPIC 4.69.02 and as mandated by CrR 6.5. The court did not question any jurors about the extent of their deliberations, but it implied that it did not believe the jury had started to deliberate. 7RP 1001. This assumption is illogical, because the court had expressly directed the jurors to "commence your deliberations." 6RP 985. Jurors "are presumed to follow" the court's instructions. *State v. Emery*, 174 Wn.2d 741, 754, 278 P.3d 653 (2012). There is no reason to believe the jury had not started discussing the case as it had been instructed to do.

After the jury left the courtroom to begin deliberations, the clerk's minutes state the jury "knock[ed] with a question." Supp. CP _, sub. no. 51 (clerk's minutes, page 18). The judge conferred with counsel but without either defendant and without any comment to the

jury that it should pause its deliberations. *Id.* (clerk's minutes, pages 18-19). Thirty seven minutes after the court directed the jury to commence deliberations, it called Juror 3 into the courtroom. *Id.* She explained that she had an airplane flight to California the following day that was leaving at 5:55 p.m. 6RP 990. The court directed Juror 3 to return to the jury room without further instruction to Juror 3 or the remaining jurors. 6RP 992.

The court postponed determining whether Juror 3 should continue deliberating or be replaced by an alternate until the next day. 6RP 992-93. It did not "want to take any action" without the defendants. 6RP 993. At no point did the court tell the jury to stop deliberations while it conferred with the parties about Juror 3's travel plans. 6RP 990-94.

The next morning, the parties agreed to replace Juror 3 with an alternate juror. 7RP 1000. The court called all jurors into the courtroom at 9:09 a.m. Supp. CP _, sub. no. 51 (clerk's minutes, page 19); 7RP 1001. The court announced, "Based on our conversations with Juror 3 yesterday, I am going to excuse Juror 3 at this time." 7RP 1002.

To the remaining jurors, the court said:

> We need a little bit of time for Denese to get a hold of the first alternate. I need you to wait in the jury room until the first alternate arrives. . . . Once all 12 of you are present, you will then be given the jury instructions and the admitted exhibits, and you will then be able to commence your deliberations. Hopefully this will not result in a significant delay.

7RP 1002.

According to the clerk's minutes, an alternate juror arrived at 10:32 a.m. and joined the jurors for deliberations. Supp. CP _, sub. no. 51 (clerk's minutes, page 20). The court did not provide any further instructions to the jurors. The jury announced that it reached its verdict at 2:15 p.m., after recessing for lunch from 11:59 a.m. until 12:30 p.m. *Id.* The jury convicted both defendants of each of the four charged counts. CP 200-03; 7RP 1005-07.

CrR 6.5 expressly requires reinstruction to a reconstituted jury before beginning deliberations. The jury must be told to disregard prior deliberations and begin deliberations anew. CrR 6.5. The instructions are necessary both to explain the process of deliberations and ensure that the alternate juror retains her impartiality. *Stanley*, 120 Wn.App. at 315; *Ashcraft*, 71 Wn.App. at 462. While the court may have assumed the jurors did not progress too far in deliberations, it never asked the jurors about their deliberations. The court's oblique reference when

excusing Juror 3 that the jurors must wait in the jury room until the alternate arrives and then commence deliberations did not explain that all previous discussions must be disregarded and does not satisfy the explicit requirements of CrR 6.5.

c. *The error was not harmless and Mr. Blancaflor is entitled to reversal of his conviction and remand for a new trial*

Since the failure to reinstruct the jury when replacing one juror during deliberations raises an error of constitutional magnitude, the State bears the burden of proving beyond a reasonable doubt that the error is harmless. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Ashcraft,* 71 Wn.App. at 466. The "reviewing court must be able to determine *from the record* that jury unanimity" was preserved. *Ashcraft*, 71 Wn.App. at 466 (emphasis in original).

Here, the record does not show all jurors took part in all aspects of jury deliberations as required to preserve jury unanimity. The jury did not receive any instructions to begin deliberations anew or disregard prior deliberations. The jury returned its verdict in a total of three hours, resolving eight counts of employer fraud and theft for the two defendants, having heard testimony from many witnesses over five

days of trial, including the testimony of both co-defendants. The shortness of deliberations increases the likelihood that the jurors relied on prior deliberations to reach the final verdict. This error requires reversal of Mr. Blancaflor's convictions and remand for retrial. *Stanley,* 120 Wn.App. at 318.

2. **Multiple convictions for an employer's false reporting of payroll or employees for tax purposes violate double jeopardy**

a. *Multiple charges based on violating a single statute must rest on separate units of prosecution.*

The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. *Blockberger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9.[1] "Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently." *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

When a person is charged with violating the same statutory provision a number of times, multiple convictions violate double jeopardy unless each conviction is predicated on a separate "unit of prosecution." *State v. Adel*, 136 Wn.2d 607, 610, 40 P.3d 669 (2002). The prosecution may not divide conduct that constitutes a single unit of prosecution into multiple charges for which it seeks separate punishment. *Id.*

Determining the unit of prosecution rests on how the statute defines the punishable act. "If a statute does not clearly and unambiguously identify the unit of prosecution, then we resolve any ambiguity under the rule of lenity to avoid turning a single transaction into multiple offenses." *State v. Sutherby*, 165 Wn.2d 870, 878-79, 204 P.3d 916 (2009) (internal citations omitted).

"Appellate review of the unit of prosecution is de novo" and a "double jeopardy challenge may be raised for the first time on appeal." *State v. Durrett*, 150 Wn.App. 402, 406, 208 P.3d 1174 (2009).

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[1] The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. amend. 5; Const. art. I, § 9.

In *State v. Turner*, 102 Wn.App. 202, 206-07, 6 P.3d 1226 (2000), *rev. denied*, 143 Wn.2d 1009 (2001), the prosecution segmented numerous individual incidents of theft into four counts of first degree theft and each charge was based on the method the defendant used to steal property from his employer. After examining the theft statute, this Court concluded that the unit of prosecution for theft rests on the value of stolen property, not the mechanism for stealing it. *Id.* at 208-09. The statute does not mention "schemes or plans" in the elements of first degree theft or in distinguishing the degrees of theft. *Id.* at 209. "[N]o wording in the statute" indicated any other relevant distinction for multiple acts of theft against the same person over a period of time. *Id.* Accordingly, it violated double jeopardy to divide the defendant's conduct into separate counts based on the method of theft. *Id.*

Similarly, in *Durrett*, the defendant was charged with two counts of failing to register as a sex offender based on two different time periods in which the defendant did not register as required. 150 Wn.App. at 406. By statute, the defendant was obligated to report every week to the sheriff's office. *Id.* at 407. The knowing failure "to comply with *any of the requirements* of this section is guilty of a class C

felony." *Id.* at 407 (emphasis in original, citing former RCW 9A.44.130(11)(a)). Based on the statutory scheme, the *Durrett* Court concluded that the duty to register is an "on-going obligation" and not "a collection of discrete actions." *Id.* at 409. Consequently, the statutory "duty to report weekly is more appropriately described as an ongoing course of conduct that may not be divided into separate time periods to support separate charges." *Id.* The court reversed one of the two counts of failure to register based on the double jeopardy violation. *Id.* at 413.

Mr. Blancaflor was convicted of three counts of employer false reporting pursuant to RCW 51.48.020(b). The State divided the offense into three counts based on the year in which the offense occurred: count 1 was 2007, count 2 was 2008, and count 3 was January 1 through June 30, 2009. CP 61-63. There is no evidence that the Legislature intended this unit of prosecution.

b. *The unit of prosecution for employer's false reporting is the on-going conduct of falsely reporting information to the State.*

The first step in determining the unit of prosecution is examining the statute. *Turner*, 102 Wn.App. at 207-08. RCW 51.48.020(1)(b) provides as follows:

(b) An employer is guilty of a class C felony, if:

> (i) The employer, with intent to evade determination and payment of the correct amount of the premiums, knowingly makes misrepresentations regarding payroll or employee hours; or
> (ii) The employer engages in employment covered under this title and, with intent to evade determination and payment of the correct amount of the premiums, knowingly fails to secure payment of compensation under this title or knowingly fails to report the payroll or employee hours related to that employment.

Statutes relating to criminal law are given a "strict and literal interpretation." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003). The purpose of construing a statute is to determine the intent of the legislature, but ambiguities are interpreted in the light most favorable to the defense. *State v. Jacobs*, 154 Wn.2d 596, 600-01, 603, 115 P.3d 281 (2005).

Nowhere in the statute is there any indication that the Legislature intended to define the offense based on the year of its occurrence. The statutory language indicates an expectation of on-going acts by an employer. It is defined as involving multiple "misrepresentations," the failure to pay the correct "premiums," and the failure to report "employee hours," rather than a single instance of misrepresenting payroll or an employee. RCW 51.48.020. The use of plural language, rather than words "specifying the singular," indicates

legislative intent to broadly define the unit of prosecution as including multiple acts over a period of time. *Durrett*, 150 Wn.App. at 408-09.

Legislative history may also shed light on the intended unit of prosecution. *See Durrett*, 150 Wn.App. at 409-10. The felony offense of employer false reporting was enacted in 1997, after a task force recommended "methods of improving compliance with employer responsibilities for covering workers under state industrial insurance law and other laws."[2] A prior statute making it a misdemeanor to willfully fail to provide industrial insurance coverage for workers was considered ineffective because it was never charged. See Appendix A (House Bill Report, SB 5570); former RCW 51.48.015. By enacting RCW 51.48.020(1)(b), the Legislature substantially increased the financial and penal penalties imposed on an employer. The time period of an employer's conduct was not discussed in the bill reports for SB 5570.

Absent any clear legislative directive that the unit of prosecution is the year in which the employer engaged in an on-going misrepresentation or failure to report employees, the State lacks

authority to divide the offense into multiple counts and seek multiple punishments. *Durrett*, 150 Wn.App. at 409; *Turner*, 102 Wn.App. at 207.

c. *The double jeopardy violation requires striking two convictions for employer false reporting and remanding the case for resentencing.*

When multiple offenses constitute a single unit of prosecution for purposes of double jeopardy, the court may impose only a single sentence and judgment entered may not refer to both offenses. *State v. Turner*, 169 Wn.2d 448, 464, 238 P.3d 461 (2010).

As the Supreme Court explained in *Turner*,

> To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction-nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

169 Wn.2d at 464-65. Due to the double jeopardy violation, the court must strike two of the three false reporting convictions, reduce Mr. Blancaflor's offender score, and resentence Mr. Blancaflor.

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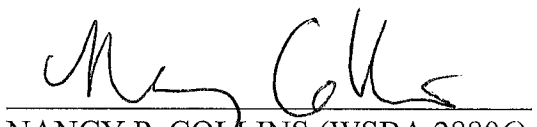
[2] The House Bill Analysis and Final Bill Report for SB 5570 (1997), are attached as Appendix A and available at: http://dlr.leg.wa.gov/billsummary/default.aspx?year=1997&bill=5570.

F. CONCLUSION.

For the reasons stated above, as well as those raised in Mr. Blancaflor's Opening Brief, he respectfully asks this Court to reverse his convictions and remand his case for further proceedings.

DATED this 6th day of September 2013.

Respectfully submitted,



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APPENDIX A

FINAL BILL REPORT

SB 5570

C 324 L 97
Synopsis as Enacted

Brief Description: Expanding tax evasion penalties.

Sponsors: Senators Newhouse, Schow, Horn, Heavey, Franklin, Fraser and Oke; by request of Joint Task Force on Nonpayment of Employer Obligations.

Senate Committee on Commerce & Labor
House Committee on Commerce & Labor

Background: A significant number of potential criminal fraud cases, many involving hundreds of thousands of dollars, are routinely rejected by the AG's office because the employer never filed a quarterly report and did not, therefore, violate existing felony laws. The current statute on "failure to secure payment of compensation" makes such failure a misdemeanor with a maximum $100 fine per day. Personnel in the Department of Labor and Industries have no recollection of anyone being prosecuted under the misdemeanor provisions. According to the Assistant Attorney General with the economic crimes unit, that unit has never prosecuted misdemeanors and local prosecutors would generally not consider a misdemeanor prosecution for this offense worth the expenditure of resources.

Summary: Misrepresentation of payroll or employee hours is subject to a civil penalty if made knowingly. The penalty of ten times the difference in premiums paid and premiums that should have been paid is made a maximum penalty.

It is a class C felony if an employer, with intent to evade premium payments, knowingly makes misrepresentations about payroll or employee hours, knowingly fails to secure payment of compensation, or knowingly fails to report payroll or employee hours.

On conviction, the court must order payment of premiums due, a penalty equal to the premiums due, and interest. The penalty is disbursed in equal amounts to the investigating agencies, the prosecuting authority, and the county in which the prosecution takes place.

The current misdemeanor penalty for willful failure to secure payment of compensation is repealed.

Votes on Final Passage:

Senate	48	0	
House	97	0	(House amended)
Senate	46	0	(Senate concurred)

Effective: July 27, 1997

HOUSE BILL ANALYSIS
SB 5570

Brief Description: Expanding tax evasion penalties.

Sponsors: Senate Committee on Commerce & Labor (originally sponsored by Senators Newhouse, Schow, Horn, Heavey, Franklin, Fraser, and Oke; by request of the Joint Task Force on Nonpayment of Employer Obligations)

Hearing: March 24, 1997

BACKGROUND:

PENALTIES UNDER THE INDUSTRIAL INSURANCE LAW

Employer penalties for failing to insure workers. Employers subject to the state's industrial insurance law must either be insured with the state fund administered by the Department of Labor and Industries or be self-insured.

Employers who fail to insure their workers are subject to a maximum penalty of $500 or double the amount of premiums that were incurred before coverage was obtained, whichever is greater. Employers are also liable for a penalty of 50 to 100 percent of the cost of benefits paid to a worker who is injured before coverage is obtained.

If the employer willfully fails to obtain coverage, the employer is guilty of a misdemeanor with a fine of $25 to $100. Each day of violation is a separate offense.

Penalties and fines are deposited in either the medical aid or accident funds, as directed by statute.

Employer penalties for misrepresentation. An employer who misrepresents the amount of his or her payroll or employee hours on which the industrial insurance premium is based is liable for 10 times the difference in the amount of premiums paid and the amount that should have been paid. If the misrepresentations are knowing, the employer is guilty of a felony or gross misdemeanor under the applicable theft provisions of the state's criminal code.

Penalties for workers and providers who make misrepresentations. A person who claims industrial insurance benefits and who knowingly gives false information in an application is guilty of a felony or gross misdemeanor under the applicable theft provisions of the state's

criminal code. A person or legal entity that knowingly makes false statements of material facts used in determining rights to payment under the industrial insurance law is guilty of a class C felony.

Task force recommendations. In 1996, Substitute House Bill 2513 created the Task Force on Nonpayment of Employer Obligations. The task force was directed to make recommendations on, among other issues, methods of improving compliance with employer responsibilities for covering workers under state industrial insurance law and other laws.

The task force report in December, 1996, included a recommendation that the Legislature should eliminate the employer misrepresentation provisions under the industrial insurance law and add new felony provisions addressing employers who knowingly, with an intent to defraud, make false representations about their obligations or fail to file required information. The task force reported that agency personnel could not recall the prosecution of any employer for failure to insure under the current misdemeanor statute.

PENALTIES UNDER STATE REVENUE LAW

Most businesses are required to register with the Department of Revenue and file business and occupation tax returns. It is a class C felony for a person or entity to engage in business after the revocation of its certificate of registration or to make a false tax return or false statement in a tax return to the Department of Revenue, with intent to defraud the state or evade payment of tax.

STATUTE OF LIMITATIONS FOR FELONIES PROSECUTIONS

The Washington criminal code provides time limits for the prosecution of certain criminal offenses. Felonies subject to limitations generally must be prosecuted within three years of the commission of the crime unless the statute specifically grants a longer statute of limitations.

SUMMARY OF BILL:

PENALTIES UNDER THE INDUSTRIAL INSURANCE LAW

The penalty for an employer who misrepresents the amount of payroll or hours is made a maximum of 10 times the difference in premium paid and premium that should have been paid. The application of the penalty is limited to intentional misrepresentation.

The criminal penalties for an employer who knowingly misrepresents its payroll or hours under the state criminal code's theft provisions are deleted and new felony provisions are added. Under the new felony provisions, it is a class C felony for a person or corporation

to:

- knowingly, with intent fraudulently to evade premium payments, to make a false statement or representation of a material fact in a report or other written document, or electronic transmittal, in connection with the obligation to pay premiums.

- knowingly, with intent fraudulently to evade premium payments, to accept assertions that contain materially false information in connection with the obligation to pay premiums.

- having knowledge of a event material to determination of the obligation to pay premiums, to conceal or fail to disclose the event with intent fraudulently to secure a determination of a lesser amount than is owed.

- having knowledge of the obligation to notify the department, to conceal, fail to file or disclose information with an intent fraudulently to evade premium payments.

In addition to other penalties provided by law, an employer convicted of a class C felony under these new provisions is subject to not more than five years in prison and up to a $25,000 fine (up to $100,000 for a corporation). On conviction, the court must order the employer to pay the premiums due, pay a penalty equal to the premiums due, and pay interest from the time the premium was due.

The premiums and interest collected by the court must be transmitted to the Department of Labor and Industries. The additional penalty collected by the court must be disbursed one-third to the involved law enforcement and investigative agencies, one-third to the prosecuting attorney, and one-third to the general fund of the county whether the prosecution occurred.

STATUTES OF LIMITATIONS FOR FELONY PROSECUTIONS

The new class C felony provisions for employer misrepresentation must be prosecuted within five years after the commission of the felony. The statute of limitations for the following class C felonies are changed from a three-year statute of limitations to a five-year statute of limitations:

- applicable felony theft prosecutions under the criminal code for persons claiming industrial insurance benefits who knowingly give false information required in a claim application.

- prosecutions of persons or legal entities who knowingly make false statements of material facts in connection with an application for payment for industrial insurance services or, having knowledge of an event affecting the right to payment, conceal or

fail to disclose the event with intent fraudulently to secure greater payment than is due.

- prosecutions of persons who engage in business in the state after revocation of their certification of registration with the Department of Revenue or who make a false tax return or false statement in a tax return to the Department of Revenue, with intent to defraud the state or evade payment of tax.

RULES AUTHORITY: The bill does not contain provisions addressing the rule-making power of an agency.

FISCAL NOTE: Available.

EFFECTIVE DATE: Ninety days after adjournment of session in which bill is passed.

SENATE BILL REPORT

SB 5570

As Passed Senate, March 12, 1997

Title: An act relating to tax evasion.

Brief Description: Expanding tax evasion penalties.

Sponsors: Senators Newhouse, Schow, Horn, Heavey, Franklin, Fraser and Oke; by request of Joint Task Force on Nonpayment of Employer Obligations.

Brief History:
Committee Activity: Commerce & Labor: 2/20/97, 2/25/97 [DP].
Passed Senate, 3/12/97, 48-0.

SENATE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass.
Signed by Senators Schow, Chair; Horn, Vice Chair; Franklin, Fraser, Heavey and Newhouse.

Staff: Jack Brummel (786-7428)

Background: A significant number of potential criminal fraud cases, many involving hundreds of thousands of dollars, are routinely rejected by the AG's office because the employer never filed a quarterly report and did not, therefore, violate existing felony laws. The current statute on "failure to secure payment of compensation" (RCW 51.48.015) makes such failure a misdemeanor with a maximum $100 fine per day. Personnel in the Department of Labor and Industries have no recollection of anyone being prosecuted under the misdemeanor provisions. According to the Assistant Attorney General with the economic crimes unit, that unit has never prosecuted misdemeanors and local prosecutors would generally not consider a misdemeanor prosecution for this offense worth the expenditure of resources.

Summary of Bill: The current employer misrepresentation provisions of the workers' compensation statutes are modified to make an employer who intentionally misrepresents payroll or employee hours liable for up to ten times the difference between the amount due and the amount paid. It is a felony to: (1) knowingly make false representations about obligations with an intent to defraud; (2) knowingly accept false information about obligations with an intent to defraud; (3) conceal information with an intent to defraud; or 4) knowingly fail to file required information with an intent to defraud.

The felony provisions of the workers' compensation laws and felonious tax evasion under the state's revenue requirements have a five year statute of limitations.

Appropriation: None.

Fiscal Note: Requested on February 3, 1997.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: None.

Testimony Against: None.

Testified: No one.

House Amendment(s): The amendment strikes the underlying bill and adds these provisions:

Misrepresentation of payroll or employee hours is subject to a civil penalty if made knowingly. The penalty of ten times the difference in premiums paid and premiums that should have been paid is made a maximum penalty.

It is a class C felony if an employer, with intent to evade premium payments, knowingly makes misrepresentations about payroll or employee hours, knowingly fails to secure payment of compensation, or knowingly fails to report payroll or employee hours.

On conviction, the court must order payment of premiums due, a penalty equal to the premiums due, and interest. The penalty is disbursed in equal amounts to the investigating agencies, the prosecuting authority, and the county in which the prosecution takes place.

The amendment also repeals the current misdemeanor penalty for wilful failure to secure payment of compensation, and removes the bill's provisions for a five-year statute of limitations and a fine of from $25,000 to $100,000.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 42832-6-II
v.	)	
	)	
OTHNIEL BLANCAFLOR,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SUSAN DANPULLO, AAG [susand1@atg.wa.gov] OFFICE OF THE ATTORNEY GENERAL PO BOX 40145 OLYMPIA WA 98504-0145	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
[X] OTHNIEL BLANCAFLOR 7835 WOODWORTH AVE N TACOMA, WA 98406	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF SEPTEMBER, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

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Court of Appeals Case Number: 42832-6

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Other: _____

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 42832-6-II
v.	)	
	)	
OTHNIEL BLANCAFLOR,	)	
	)	
APPELLANT.	)	

SUPPLEMENTAL DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF SEPTEMBER, 2013, I CAUSED A TRUE COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KENNETH BLANFORD ATTORNEY AT LAW PO BOX 7843 TACOMA, WA 98417-0843	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF SEPTEMBER, 2013.

X_____

CC: SUSAN DANPULLO, AAG

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
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Court of Appeals Case Number: 42832-6

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Other: _____

Comments:

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Sender Name: Maria A Riley - Email: **maria@washapp.org**

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